

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DEBRA WERNER)	
Claimant)	
VS.)	
)	Docket No. 251,234
INTEGRATED HEALTH SERVICES)	
Respondent)	
AND)	
)	
TRAVELERS INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appealed the March 6, 2000 preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore.

ISSUES

This is a claim for a low back injury. The Application for Hearing that claimant filed with the Division of Workers Compensation on January 20, 2000, alleges a series of accidents from "12-18-99 to present." After finding that claimant failed to provide the respondent with timely notice of the accident or injury, the Judge denied claimant's request for benefits.

Claimant contends Judge Moore erred. Claimant argues that respondent had notice of the accidental injury as (1) she allegedly told her acting supervisor on December 18, 1999, that she was hurting from working; (2) she allegedly told her immediate supervisor on December 19, 1999, that she was hurting from working the night before; and (3) by December 29, 1999, respondent allegedly had received a copy of Dr. Aaron Sauer's medical records that indicated claimant was alleging her work on December 18, 1999, was causing her symptoms.

Conversely, respondent contends Judge Moore's findings are well supported by the evidence and should be affirmed.

The only issue before the Appeals Board is whether claimant provided respondent with timely notice of the accident or injury.

FINDINGS OF FACT

After reviewing the file compiled to date, the Appeals Board finds:

1. The claimant's Application for Hearing alleged a series of accidents commencing December 18, 1999. But at the preliminary hearing, claimant amended the accident date to a series of traumas ending December 18, 1999, because that was her last day of work.
2. Claimant worked for respondent for two years as a cook and dietary aide. On December 18, 1999, claimant experienced low back symptoms while preparing a meal. Claimant reported to the charge nurse, who was the acting supervisor at that moment, that her back was hurting and that she didn't know if she could finish her shift.
3. Claimant was scheduled to work the next day, December 19, 1999. But claimant did not work that day as her supervisor, Mary Ann Bieberle, sent her home after observing that claimant could hardly walk. Claimant is unsure whether she told Ms. Bieberle in that conversation that her back was hurting from the work that she did the night before.
4. Claimant contacted her chiropractor, Dr. Aaron Sauer, on Monday, December 20, 1999. The doctor referred her for a cortisone injection. The next day, December 21, 1999, claimant saw Dr. Sauer. According to claimant, she gave respondent's administrator, Mary Drake, the off-work slips from Dr. Sauer and spoke with Ms. Drake about how her symptoms started.
5. At the time of the March 2000 preliminary hearing, claimant had not returned to work and was still receiving medical treatment.
6. Before December 18, 1999 claimant had a history of back symptoms. In March 1998 she began having low back symptoms and was off work for approximately one month. Since that time, claimant has obtained monthly back adjustments. And in October 1999, claimant experienced back soreness after returning from a girl scout camp out. Claimant often complained to co-workers that her back was sore. In December 1999, claimant was working with restrictions against lifting over 10 to 20 pounds.
7. There is evidence that contradicts claimant's testimony that she gave respondent prompt notice of her back injury. According to Ms. Bieberle, claimant did not relate her back problems to work. According to Ms. Drake, claimant did not relate her back symptoms to her work when they met on December 27, 1999, which was their first meeting following claimant's leaving work on December 18, 1999. On December 29, 1999, claimant requested family medical leave forms after Ms. Drake explained that family leave would be available for a non-work-related injury and workers compensation benefits would be available for a work-related injury. Ms. Drake first learned that claimant was relating her back complaints to work when she received a letter from claimant on January 13, 2000.

8. Judge Moore observed claimant, Ms. Bieberle, and Ms. Drake testify. After considering all of the evidence, the Judge found claimant's testimony was not persuasive. In this instance, the Appeals Board gives some deference to the Judge's impression of claimant's credibility and affirms the finding that claimant failed to prove that she provided respondent notice of the accident or injury within 10 days of December 18, 1999. Further, the Appeals Board finds that claimant has failed to prove that she had just cause that would excuse the failure to notify respondent of the accident or injury within the first 10 days of December 18, 1999.

CONCLUSIONS OF LAW

1. The preliminary hearing Order should be affirmed.
2. The Workers Compensation Act places the burden of proof on injured workers to establish their right to compensation.¹ And that burden is to persuade the trier of facts by a preponderance of the credible evidence that their position on an issue is more probably true than not when considering the whole record.²
3. The Workers Compensation Act requires a worker to provide the employer timely notice of a work-related accident or injury. The Act reads:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable

¹ K.S.A. 1999 Supp. 44-501(a).

² K.S.A. 1999 Supp. 44-508(g).

to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.³

4. As indicated in the findings above, claimant, within 10 days of December 18, 1999, failed to notify the respondent that she hurt her back at work. Additionally, claimant failed to prove that she had just cause that would extend the time for providing notice. Therefore, the request for benefits should be denied.

5. As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing of the claim.⁴

WHEREFORE, the Appeals Board affirms the March 6, 2000 preliminary hearing Order entered by Judge Moore.

IT IS SO ORDERED.

Dated this ____ day of April 2000.

BOARD MEMBER

c: Robert A. Anderson, Ellinwood, KS
Jeffrey E. King, Salina, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director

³ K.S.A. 44-520.

⁴ K.S.A. 1999 Supp. 44-534a(a)(2).